Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

Rosemarie Pink

V.

Modoc Indian Health Project,
Indian Health Service,
Erin Forrest, as an individual

On Petition For Writ Of Certiorari
To The Untied States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Rosemarie Southcott Pink
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52 pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Does a provision in a tribal constitution, which expressly limits a tribes jurisdiction to within the boundaries of the tribe's reservation, preclude the tribe from creating a corporation which would enjoy the status of a tribe, if the corporate offices, of such corporation, are located, and the activities are conducted, outside the boundaries of the reservation and outside of Indian country?

2. Is a tribal corporation, located off reservation and created by a consortium of tribes, who's constitutions expressly limit their jurisdiction to within the confines of their respective reservations, considered a tribe for the purpose of exemption from Title VII?

3. Is a tribal corporation, located off reservation and created by a consortium of tribes, who's constitutions expressly limit their jurisdiction to within the confines of their respective reservations, immune from suit in federal court, when no tribal court exists?

LIST OF PARTIES TO THE PROCEEDING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1. Plaintiff/Appellant

   Rosemarie Southcott Pink,

2. Defendants/Appellees

   a) Erin Forrest, as an Individual
   b) Modoc Indian Health Project, Inc.
   c) United States, Indian Health Service
   d) Does one through fifty,

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CITATIONS OF REPORTS AND OPINIONS ENTERED BY COURTS AND ADMINISTRATIVE AGENCIES

CIV S-94-1734 GEB/JFM ORDER
CIV S-94-1736 GEB/JFM ORDER
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BASIS FOR JURISDICTION

(i) The appellate court decision was entered on October 6, 1998. A petition for rehearing was submitted in a timely manner. The order denying the petition for rehearing was filed on February 17, 1999.

(ii) The order denying the petition for rehearing was filed on February 17, 1999.

(iii) Not applicable.

(IV) I am requesting a Writ of Certiorari based on my belief that the issues raised qualify for consideration based on **Rule 10(a)**, and **10(c)**. This petition is filed in a timely manner per **Rule 13**. As the Order Denying the Petition for rehearing was filed on February 17, 1999, the last day of the ninety day time limit for filing, is May 18, 1999. This petition was filed on May 18, 1999.

CITATIONS OF CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS.

1. Indian Reorganization Act of June 18, 1934 (48 Stat. 984)

2. The Constitution and Bylaws of the Cedarville Rancheria; Article II- Territory; Certificate of Results of Election.

3. The Constitution and Bylaws of the Alturas Indian Rancheria; Article II- Territory

4. Indian Self Determination Act 93-638

STATEMENT OF THE CASE

The Modoc Indian Health Project, Inc. was created by the Alturas, Lookout and Cedarville Rancherias. Currently, Modoc Indian Health Project is controlled by a board of directors made up of representatives or members of the Alturas and Cedarville Rancherias. In the case of the Cedarville Rancheria, the representative has been appointed by the Modoc Indian Health Project Director, an employee, and is not a duly elected or tribally appointed representative, due to a dispute between Modoc Indian Health and the Cedarville Rancheria. Modoc Indian Health is a non profit corporation organized for the purpose of providing health, educational and related services to eligible Indians, which include, but are not limited to, tribal members of the Alturas and Cedarville Rancherias. Modoc Indian Health Project's offices are located off of the reservation/Rancheria, in the city of Alturas, CA. The majority of Modoc's clients live off reservation, and are not members of either the Cedarville or Alturas Rancherias. Then majority of Modoc's activities take place outside of Reservation boundaries, except for the transporting of the small number of clients living within the reservation/Rancheria boundaries, to medical appointments.

The Alturas and Cedarville Rancherias are federally recognized tribes, organized under the Indian Reorganization Act. The provisions of the constitutions of both tribe's states that the jurisdiction of the tribe shall be limited to the land located within the confines of the Rancherias on the date of acceptance of the respective constitutions.

Erin Forrest is the Project Director of the Modoc Indian Health Project, inc. He is not a member of either the Alturas, Lookout or Cedarville Rancherias.

Rosemarie Southcott Pink is a former employee of the Modoc Indian Health Project. She is not a member of either the Alturas, Cedarville or Lookout Rancherias. Pink was hired in November, 1983 as the coordinator of Modoc's Indian Child welfare act Program. She subsequently held other positions with Modoc, including substance abuse program coordinator and State Women's alcohol program. Beginning in July 1991 and continuing until her termination in October 1993, she was subjected to sexual harassment, sexual assault, hostile workplace environment and retaliation. Per Modoc's personnel policies, Pink filed a complaint with the California State Department of fair Employment and Housing. The complaint was investigated by the department which recommended the filing of a complaint against Forrest and Modoc for sexual harassment, hostile workplace and retaliation. Modoc then challenged the State's jurisdiction and the case was closed due to a lack of jurisdiction. Since no tribal judicial system exists, Pink filed a suit under federal and state law for employment discrimination and breach of contract. The district court dismissed Pinks Complaint for lack of subject matter jurisdiction and because they found Modoc Indian Health to be a "tribe" for purposes of exemption from title VII. Pink Appealed to the 9th district court of appeals, which affirmed the lower court's decision.

(i)The questions at issue involve federal jurisdiction. Suit was brought in the federal district court because, the State of California, through the decision of the State of California Department of Fair Employment and Housing, refused jurisdiction and because no tribal court or other

tribal judicial process exists for having my complaint heard.

REASONS FOR GRANTING THE WRIT

(h) I am seeking a petition for a writ of certiorari under Rule 10; (a) and (c). The ramifications of conferring the status of Indian tribe upon an off reservation corporation, whose creators, through their respective constitution's, expressly preclude such an act, are potentially so great as to warrant review by this court. The lower court's decisions are in conflict with the decisions of other appellate courts, with opinions of this court and with congressional mandates.

At issue is the question of whether Modoc Indian Health is considered to be a tribe. If Modoc is a tribe, then it enjoys sovereign immunity from suit, like it's creators. If Modoc Indian Health is not a tribe, then suit can properly be brought in federal court, since no tribal judicial system exists for adjudicating complaints. In Edward Kempel v Prairie Island no 96-3573 (8th cir.) the court of appeals for the eighth district held that:

"Because tribal court was not in operation until after claim was filed, plaintiff could not be required to exhaust tribal remedies. "

The Supreme Court has recognized that mandatory deference to the tribal courts does not mean the deference is absolute. For example, in National Farmers Union, the Court stated that exhaustion would not be required where it would be "futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." 471 U.S. at 856 n.21.(1) .

The Court relied on Dille v. Council of Energy Resource tribes, 801 F.2d 373 (10th Cir. 1986), in which the 10th circuit court held that "a council comprised of thirty-nine Indian tribes that had joined together to collectively manage energy resources was a "tribe" within the scope of Title VII's Indian Tribe exemption." Based on Dille, the court determined that Modoc served as an arm of the sovereign tribes, acting as more than a mere business. The court did not take into account the provisions of each Tribe's governing documents, the tribal constitutions, which expressly limit the jurisdiction of both tribe's to within the confines of their respective Rancheria's. This provision is part of a duly approved and accepted Constitution for each tribe. It is clear that Alturas and Cedarville Rancherias intended to prohibit the formation of off reservation corporations, which would carry an authority equal to the tribes themselves. Therefore, Modoc Indian health, by virtue of the limitations put on it by it's creators, cannot be considered an "arm" of the tribe, and cannot be afforded tribal sovereign immunity. In Santa Clara Pueblo v Martinez 436 U.S. 39, 58 (1978), the Supreme Court reaffirmed that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed" Citing the Martinez case, the Eighth Circuit Court of Appeals in Dillon v Yankton Sioux Tribe Housing Authority No. 97-3107 stated that a tribal resolution is an expressed waiver of sovereign immunity. As the authority for tribal resolutions comes from a tribe's governing documents, then a constitutional provision limiting a tribes jurisdiction, and hence the power to form off reservation tribal corporations which enjoy the status of an Indian Tribe, can be considered an express waiver of sovereign immunity as it relates to off reservation programs.

Modoc Indian Health is not on the Bureau of Indian Affair's list of Federally recognized tribes. The fact that a contract under the *Indian Self Determination Act* 93-638 has been awarded to Modoc does not in itself confer the

status of Tribe to Modoc, as, given the provisions of the tribal constitutions, the Indian Health Service may have erred in regards to the terms under which it entered into the contract.

If Modoc is considered not to be a Tribe, based on the foregoing arguments, then the member tribes would not have jurisdiction to hear the complaints of sexual harassment, etc. In two Supreme Court case, Strate v A-1 Contractors, 95-1872 (1997) and
No. 96-1577: ALASKA v. NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT,
In Strate, the court held that "the civil authority of Indian Tribes and their courts with respect to non-Indian fee lands generally does not extend to Activities of non members of the Tribe." In Venetie the court held that:

> "The Tribe contends that the requisite federal superintendence is present because the Federal Government provides desperately needed health, social, welfare, and economic programs to the Tribe. Brief for Respondents 28. The Court of Appeals majority found this argument persuasive. 101 F.3d,at 1301. Our Indian country precedents, however, do not suggest that the mere provision of desperately needed social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem with ANCSA's minimal land-related protections, they are not

indicitive of active federal control over the Tribe's land sufficient to support a finding of federal superintendence."

The Village of Venetie was not located within Indian Country and therefore the village of Venetie no longer has jurisdiction over the activities of non-members on village lands. Similarly, Modoc Indian Health is not located within Indian Country, and the mere fact that they enter into contracts which provide services to Indians does not give them authority beyond that of a service provider.

Respectfully Submitted

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-94-1734 GEB/JFM
ROSEMARIE PINK,
Plaintiff,
v.

MODOC INDIAN HEALTH PROJECT, INC., INDIAN HEALTH SERVICE, ERIN FORREST, as an Individual, and does ONE THROUGH FIFTY, Inclusive,

Defendants.

CIV S-94-1736 GEB/JFM
CYNTHIA GONZALEZ,
Plaintiff,
v.

MODOC INDIAN HEALTH PROJECT, INC., INDIAN HEALTH SERVICE, ERIN FORREST, as an Individual, and does ONE THROUGH FIFTY, Inclusive,

Defendants.

ORDER

Pending are Defendants' motions seeking to dismiss this action based on lack of subject matter jurisdiction.[1] Defendants Modoc Indian Health Project (Modoc) and Erin Forrest (Forrest) contend that the doctrine of tribal sovereign immunity derives the court of subject matter jurisdiction. In the alternative, Modoc and Forrest seek to substitute the United States as the Defendant in their stead. The United States opposes the substitution motion by arguing that its sovereign immunity bars the claims. Lastly, Defendant Indian Health Services seeks dismissal of claims expressly exempted from the Federal Tort Claims Act (FTC), and asserts that it may not be sued *eo nomine* under the FTCA. For the reasons stated below, the court lacks subject matter jurisdiction over all claims in this action.

I. Factual Allegations and History

Plaintiffs, Rosemarie Pink (Pink) and Cynthia Gonzalez[2] (Gonzalez), were employed by Modoc until their employment was terminated on October 22, 1993. Modoc is a tribal organization created by the Alturas and Cedarville Rancherias, both federally recognized tribes.

See Notice of Motion and Motion for Substitution, Ex. A. Modoc was "organized for charitable, educational, and scientific purposes and such other related purposed as are or might be authorized by the Congress . . . relative to the delivery of certain services pursuant to the stated intent of P.L. 93-638[3] . . . " Id. Some time after its inception, Modoc entered into a self-

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[1] Because the court lacks subject matter jurisdiction over the claims in this action, it does not reach the motions based on other grounds.

[2] These actions have been related but not consolidated.

[3]. P.L. 93-638 authorizes Indian self-determination contracts. Self-determination contracts are contracts entered into by a governmental agency and a tribe or tribal organization. Under these contracts, the Tribal Organization prvovides various services to it's Native American population that were previously administered by the Federal Government Evans v. McKay 869 F. 2d 1341, 1346 (9th cir. 1989)

determination contract with Indian Health Services[4] (IHS) to provide contract health services to members of the Alturas and Cedarville Rancherias. See Notice of Motions and Motion for Substitution, Ex. C at 2. The self-determination contract was in force at least through December 1993. Id.

Pink alleges that during her employment with Modoc, Modoc's Director, Erin Forrest, subjected her to a hostile work environment because of her gender and national origin. Pink also claims that Forrest wrongfully terminated her in retaliation for supporting Pink's discriminationclaims against Forrest and because of her national origin. Both Plaintiffs bring employment discrimination, tort, and contract claims under federal and state law.

Pink is a Native American, but she is not a member of either the Alturas or Cedarville Rancheria. See Pink's Second Amended Cmplt. ¶ 28. Gonzalez is also a Native American. See Gonzalez' Second Amended Cmplt, ¶ 16. It appears that Gonzalez is a member of the Alturas Rancheria. See Defendants' Opposition to Motion for Substitution, Ex. 1 at 48. Forrest is also a Native American. See Forrest Decl. ¶ 3. It is unclear whether he is a member of either the Alturas or Cedarville Rancheria.

II. Analysis - Subject Matter Jurisdiction

Plaintiffs have invoked three separate bases for subject matter jurisdiction, 28 U.S.C. §§ 1331 and 1346, and 42 U.S.C. § 2000(e). In addition, Modoc and Forrest's substitution motion, if granted, would invoke jurisdiction under Pub. L. No. 101-512, Title III, § 314.

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[4] IHS is a branch of the United States Department of Health and Human Services. See Defendant Indian Heath Service's Memorandum in Support of its Motion to dismiss Plaintiffs' Complaint, p. 1:23-24.

Plaintiffs bear the burden of proving subject matter jurisdiction, and the lack thereof is presumed until proven. Kokkonen v. Guardian Life Ins. Co. of American, 114 S. Ct. 1673, 1675 (1994). Each asserted basis for jurisdiction is examined.[5]

1. 28 U.S.C. § 1346

Plaintiffs assert jurisdiction under 28 U.S.C. § 1346. However, the only federal entity sued under § is the IHS. Since the IHS is part of the United States Department of Health and Human Services, an agency of the United States, it cannot be sued *eo nomine*. 28 U.S.C. 2679(a). When a party improperly sues a federal agency *eo nomine* under the FTCA, the action should be dismissed since the FTCA does not provide a jurisdictional basis for such suits. Aviles v. Lutz, 887 F.2d 1046, 1048 (10th Cir. 1989). Therefore, the action against IHS is dismissed, and 28 U.S.C. § 1346 does not provide subject matter jurisdiction.

2. Pub. L. No. 101-512, Title III, § 314

Modoc and Forrest assert that under Pub.L. No. 101-512[6] their acts should be deemed acts of the Federal Government. Therefore, they move for an order that would substitute the United States as Defendant pursuant to § 314 of the Indian Self-Determination and Education Assistance Act (ISDEAA). If granted , this motion would allow this action to proceed against the United States under the FTCA. The threshold issues to be decided in evaluating this motion is whether Congress intended the waiver of sovereign immunity in § 314 to include the claims in this suit.

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[5] During oral argument, Plaintiffs abandoned their assertion that jurisdiction exists under § 1331.

[6] See Pub.L. No. 101-512, Title III, §314, 104 Stat. 1958, 1959 (1990), incorporated in 25 U.S.C. §§ 450, et seq., titled the Indian Self-Determination and Education Assistance Act. By virtue of Modoc's self-determination contract with the IHS, the United States concedes that Modoc is a "tribal organization" within the meaning of Pub.L. 101-512, § 314 (1990).

Plaintiffs' claims arise out of Modoc's employer-employee relationships engaged in while administering the ISDEAA contract.[7] The United States argues that § 314 does not waive its immunity for the types of claims involved in this action.[8] Therefore, determination of the scope of immunity waived is necessary.

Two maxims provide guidance on the extent to which § 314 waives the Federal Government's sovereign immunity. "First, a waiver of sovereign immunity must be definitely and unequivocally expressed." United States v. Horn, 29 F.3d 754, 762 (1st Cir. 1994) (Citation omitted). Second, a waiver "must be strictly construed in favor of the sovereign and may not be enlarged beyond the waiver its language expressly requires." Miller v. United States, 66 F.3d 220, 222 (9th Cir. 1995) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 33-35 (1992))petition for cert. led, 64 U.S.L.W. 3439 (Dec 18, 1995) (No. 95-969). These maxims demonstrate the "we must not enlarge the waiver beyond the purview of the statutory language." United States v. Williams, 115 S. Ct. 1611, 1615 (1995) (interpreting waiver of sovereign immunity in 28 U.S.C. § 1346 with respect to taxpayer suit).

"Our task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." Williams, 115 S. Ct. at 1616. If clarity does

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[7] It is pellucid that § only waives the immunity of the United States. It does not waive the immunity of an Indian tribe since § 450n(1) of the ISDEAA provides, "[n]othing in this subchapters shall
be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe. . . "

[8] The movants counter by relying on Waters v. United States, 812 F. Supp. 166 (N.D. Cal. 1993). However, it does not appear that the court in Waters the benefit of recent Supreme Court precedent that provides guidance for interpreting statutory waivers of the Federal Government's sovereign immunity.

not exist in the statutory text, "it cannot be supplied by a committee report." Nordic, 503 U.S. at 37 (citations omitted). Hence, "[i]f legislative history is needed to determine the extent or existence of a waiver of sovereign immunity, the statutory text necessarily is ambiguous and the waiver of sovereign immunity has not been unequivocally expressed." United States v. Georgia Dept. of Natural Resources, 897 F. Supp. 1464, 1466 (N.D. Ga. 1995). "Therefore, legislative history has no bearing on waivers of sovereign immunity." Id.

To fathom Congress' intent on the scope of the sovereign immunity waiver at issue, we turn first to the language of the ISDEAA. Williams, 115 S. Ct. at 1616. Section 314 of the ISDEAA provides in pertinent part:

" With respect to claims resulting from the performance of functions **under** a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-determination and Education Assistance Act of 1975, . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement. *Provided* that after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act . . . ."Pub. L. No. 101-512, § 314 (emphasis added)."

The words in this text should be interpreted in accordance with their ordinary and everyday meaning. Bresgal v. Brock, 843 F.2d 1163, 1166 (9th Cir. 1987) (discussing fundamental canons of statutory

construction). Section 314 only allows substitution of the United States for "claims resulting from the performance of functions . . . under a compact . . . or any other agreement . . . authorized by the Indian Self-determination and Education Assistance Act of 1975 . . . "[9]
(Emphasis added.)

Since only function performed "under a contract" mandate substitution, the pivotal requisite in determining what functions require § 314 substitution is to ascertain the plain meaning of the word "under." Black's Law Dictionary (6th ed. 1990) defines "under" in pertinent part as follows: "sometimes used in its literal sense of below in position, beneath . . .[or] also according to; as, 'under the testimony.'" See Rumsey Indian Rancheria Wintun Indians v. Wilson, 64 F.3d 250 (9th Cir. 1994) (quoting United States v. Launder, 743 F.2d 686 (9th Cir. 1984) as authority to reference Black's Law Dictionary to ascertain the plain meaning of statutory language). Applying either definition illustrates that congressional use of the term "under" limits "performance of function" to functions "according to" the self-determination contract or functions literally "beneath" the self-determination contract. That is, those functions or services explicitly required within the self-determination contract itself. Hence § 314 limits the waiver of sovereign immunity to functions required by contracts referenced in § 450b(j). Those "functions" in the "self-determination" contract between Modoc and the IHS primarily involve providing health care and educational outreach services to Modoc's founding tribal communities. See Notice of Motion and Motion for Substitution of the United States,

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[9] The ISDEAA authorizes the creation of self-determination contracts. Self-determination contracts are defined as contracts entered into between the tribal organizations and the Federal Government to provide enumerated services to the tribes and their members "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to federal law. . . ." 25 U.S.C. 450b(j).

Ex. C. Although Modoc must engage in employer-employee personnel functions to fulfill its obligations under this self-determination contract, these internal personnel functions are not the actual "functions" referenced in § 314. The functions referenced in § 314 only include the functions or services specifically authorized by the self-determination contract itself. Nothing in the text of § 314 explicitly extends the waiver of sovereign immunity to the underlying personnel employment contracts from which Plaintiffs' claims arise.

Although the movants argued during the hearing that legislative history support their contention that the subject personnel functions are included within the scope of the immunity waiver, legislative history has no bearing on explaining such ambiguities. Nordic, 503 U.S. at 37. The Court is required to construe ambiguities in favor of immunity, and not consult legislative history to clarify an ambiguity as to whether the Federal Government has waived its immunity. Id. at 34, 37. See Horn, 29 F.3d at 762-764; Hensel v. Office of Chief Admin. Hearing Officer, 38F.3d 505, 509 (10th Cir. 1994); Georgia Dept. of Natural Resources, 897 F. Supp. at 1466; DiMura v. Federal Bureau of Investigation, 823 F. Supp. 45, 47-48 (D. Mass. 1993).[10] Therefore, to the extent an ambiguity exists in the text of § 314, the ambiguity is construed in favor of

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[10] The Ninth Circuit consulted legislative history in United States v. Oregon, 44 F.3d 758, 765-66 (9th Cir. 1994), cert. denied, 116 S. Ct. 378 (1995), when interpreting the McCarran Amendment. In Oregon, the court found that the face of the statute clearly waived the United States' sovereign immunity, and, therefore, legislative history could be consulted to ascertain the extent of the sovereign's waiver. However, here, the question is whether the United States has even waived its immunity in § 314 for claims arising out of the subject personnel disputes. Since the face of § 314 does not clearly waive the sovereign's immunity with respect to such claims, legislative history should not be consulted.

immunity, and legislative history cannot be used to clarify the ambiguity.

Strictly construing the waiver of sovereign immunity in favor of the United States discloses that the waiver does not encompass the claims arising out of the misconduct in suit.[11] Accordingly, § 314 does not authorize substitution of the United States as Defendant in this action, and is not a basis for subject matter jurisdiction.

3. 42 U.S.C. § 2000e(b)

Plaintiffs also assert jurisdiction under 42 U.S.C. § 2000e(b) (Title VII), based on their claims against the IHS,[12] Modoc, and Forrest. Modoc counters that it is an Indian "tribe" for purposes of Title VII and therefore not an "employer" subject to the provisions of Title VII.

Congress specifically exempted tribes from Title VII liability by excluding them from the definition of employer within the meaning of the Act. 42 U.S.C. § 2000e(b). Therefore, Modoc is exempt from Title VII liability if it is a

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[11] This interpretation reconciles § 314 with the Congressional enactment of 42 U.S.C. § 2000e(b), where Congress specifically exempted Indian tribes from that Federal antidiscrimination statutory scheme. It is a cardinal rule of statutory construction that repeals by implication are disfavored. Morton v. Mancari, 417 U.S. 535, 549 (1974). Here, reading § 314 is requiring substitution of the United States for Modoc in a suit arising out of it alleged employment discrimination would mean § 314 exposes Modoc to liability for its employment-related discriminatory activity. Notwithstanding the fact that the United States would ultimately substitute for Modoc, this interpretation of § 314 would implicitly repeal Modoc's tribal exemption from 42 U.S.C. § 2000e(b).

The only rationale supporting repeal by implication is when the earlier and later statutes are irreconcilable. Id. at 550. Section 314 and 42 U.S.C. § 2000e(b) are not irreconcilable if the statutory language of § 314 is given a narrow interpretation.

[12] Plaintiffs admitted at oral argument that the IHS was not Forrest's employer, so Title VII claims do not apply to the IHS.

tribe, within the meaning of Title VII. "[I]t is a settled principle of statutory construction that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expression being resolved in favor of the Indians." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 149 (1984).

a. Is Modoc, as a tribal organization, a tribe within the meaning of Title VII?

The issue of whether Modoc is an Indian tribe within the meaning of Title VII requires consideration of the tribal formation of Modoc. The Alturas and Cedarville Rancherias formulated Modoc as a tribal corporation in 1989. See Noticed of Motion and Motion for Substitution, Ex. A at 1. Modoc's board is comprised of Native American, with two representatives from both the Alturas and the Cedarville Rancherias' tribal governments. Id. at 2. Modoc is also an Indian Corporation incorporated and chartered under the authority of the Solicitor of Indian Affairs and 25 U.S.C. § 477. Id. at 1. Hence, Modoc is a tribal organization incorporated to provide services under self-determination contracts. See Notice of Motion and Motion for Substitution, Ex. C.

However, Plaintiffs argue that since Modoc is not itself a tribe, within the meaning of Title VII,

Modoc is not immune from Title VII liability. Modoc counters by arguing that because it is a tribal organization incorporated by entities which are tribes, it is therefore a tribe within the meaning of Title VII.

Examining the rationale for the exemption of tribes from Title VII liability provides guidance on how this issue should be decided. Indian tribes were exempt from the definition of employer in Title VII because Congress wanted to promote tribal autonomy and ability to control their own economic enterprises. Senator Mundt of South Dakota explained the reason for exempting tribes as follows:

This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivision, to conduct their own affairs and economic activities without consideration of the provisions of the bill. Let me emphasize that Indian tribes in an effort to decrease unemployment and in order to integrate their people into the affairs of the national community, operate many economic enterprises, which are more or less supervised by the Indian tribes . . .

Dille v. Council of Energy Resources, 801 F.2d 373, 375 (10th Cir. 1986) (quoting 110 Cong. Rec.13702 (1964)).

Similarly, Congress was concerned about Native American autonomy when it enacted theISDEAA. The express purpose of the ISDEAA allowed tribes, through tribal organizations, to conduct their own affairs with as much autonomy as possible. Under the ISDEAA, the tribe or tribal organization enters into a contract with the government to conduct and administer programs which have traditionally been administered by the government. Congress declared it policy as follows:

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b).

This discussion discloses that the Congressional goal for the exemption of tribes from Title VII, and its goal for passing the ISDEAA, are identical: "to promote the ability of sovereign Indian tribes to control their own economic enterprises." Dille, 801 F.2d at 374. Thus, the same type of policy considerations that moved Congress to exempt tribes from Title VII are sought to be accomplished through the ISDEAA. In light of the purpose behind this exemption for tribes, it would be incongruous to hold that the immunity exemption does not extend to Modoc since it is a tribal organization that exists solely to further the autonomy of tribes that are themselves exempt from liability. Therefore, Modoc is exempt from Title VII liability. See Dille, 801 F.2d 373 (concluding that an organization created by multiple tribes to manage tribal energy resources was a tribe within the meaning of Title VII); Barnes v. Bristol Bay Area Health Corp., Case No. A92-459 (D. Alaska 1993) (holding that a tribal organization created pursuant to a self-determination contract for the purposed of providing health and educational services to tribal villages was a tribe within the meaning of Title VII).

b. Has the tribe waived its immunity?

However, a tribe's immunity from suit is not absolute and may be waived by Congress or the tribe. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). Plaintiffs assert that since Modoc was off reservation land when the alleged misconduct occurred, it has no immunity.Although some courts have used the on-off reservation distinction to analyze sovereign immunity,[13] the distinction is not dispositive in the Ninth Circuit. In re Green, 980 F.2d 590, 592, 596 (9th Cir. 1992), cert. denied, 114 S. Ct. 681

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[13] See Padilla v. Pueblo of Acoma, 754 P.2d 845, 850 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989) (holding state court may exercise jurisdiction over an Indian tribe when it is engaged in off-reservation activity).

(1994). Rather in the Ninth Circuit, sovereign immunity has an extra-territorial component, just as it existed at common law. Id. at 596 (holding tribal immunity over commercial activity does not stop at reservation boundaries); See also, Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1064 (10th Cir.), cert. denied 116 S. Ct. 57 (1995) (deciding that location of commercial activity is not determinative); Morgan v. Colorado River Indian Tribe, 443 P.2d 421, 424 (Ariz. 1968) (stating that fact that tribe was engaged in proprietary function is not important).

For the stated reasons, Modoc's immunity was not lost because the self-determination contract was performed off the reservation. Accordingly, Modoc is exempt from Title VII liability, and therefore Title VII does not provide subject matter jurisdiction over the claims against Modoc.

c. Is Forrest directly liable under Title VII?

Plaintiffs also assert Title VII claims against Forrest. However, Title VII's liability is limited to an "employer." 42 U.S.C. § 2000e(b). The statutory scheme of Title VII does not impose individual liability on employees, even supervisory employees. Miller v. Maxwell's international, Inc., 991 F.2d 583, 587 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994). As the ninth Circuit stated in Miller, "[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." Id.

Accordingly, Forrest is not personally liable under Title VII. Therefore, Title VII does not provide a basis for subject matter jurisdiction.

III. Conclusion

For the stated reasons, this Court lacks subject matter jurisdiction over this action.[14] Therefore, this action is dismissed for lack of subject matter jurisdiction. Judgment shall be entered for Defendants.

IT IS SO ORDERED.
Dated: March 5, 1996

/s/

GARLAND E. BURRELL, JR.

UNITED STATES DISTRICT JUDGE

U.S. 9th Circuit Court of Appeals

PINK v MODOC INDIAN HEALTH
9615923
ROSEMARIE SOUTHCOTT PINK,
Plaintiff-Appellant,

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[14] At oral argument, upon facing the specter of having their complaints dismissed for lack of subject matter jurisdiction, Plaintiffs requested leave to amend the complaints. However, Plaintiffs were placed on notice in May 1995 that Defendants were challenging subject matter jurisdiction over this action and yet waited until the hearing on February 9, 1996, to request leave to amend their complaints. Further, during this hearing, Plaintiffs could not articulate how they would amend their complaints to cure the jurisdictional defect. Since the alleged facts provide no basis for subject matter jurisdiction, Plaintiffs' request for leave to amend their complaints is denied.

v.

MODOC INDIAN HEALTH PROJECT, INC.; INDIAN HEALTH SERVICES; ERIN FORREST, as an individual, Defendants-Appellees.

ORDER

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted June 20, 1998*
San Francisco, California

Filed October 6, 1998

Before: Herbert Y. C. Choy, Joseph T. Sneed, and
Charles Wiggins, Circuit Judges.

Opinion by Judge Sneed
"s/ Joseph Sneed"

COUNSEL

Rosemarie Southcott Pink, Pro per, Denver, Colorado, for the
plaintiff-appellant.

Debora G. Luther, Assistant United States Attorney, Sacramento, California; Robert J. Logan, San Jose, California, for

the defendants-appellees.

OPINION

SNEED, Circuit Judge:

Rosemarie Pink ("Pink") appeals the district court's judgment dismissing her Complaint for lack of subject matter jurisdiction. Pink brought suit against the Modoc Indian Health Project, Inc. ("Modoc") (her former employer), Erin Forrest ("Forrest") (her former supervisor), and Indian Health Services ("IHS") (a federal agency), seeking damages for sexual harassment, gender, race, and national origin discrimination, and wrongful termination. We review de novo the district court's dismissal for lack of subject matter jurisdiction, see Mobil Oil Corp. v. City of Long Beach, 772 F.2d 534, 538 (9th Cir. 1985), and affirm.

I.

FACTS

Modoc is a nonprofit corporation created and controlled by the Alturas and Cedarville Rancherias, both federally recognized tribes. Modoc was "organized for charitable, educational, and scientific purposes and such other related purposes. . . relative to the delivery of certain services pursuant to [theIndian Self-Determination Act]." IHS, an agency of theUnited States Department of Health andHuman Services, awarded Modoc an Indian self-

determination contract to provide health services to tribe members. See 25 U.S.C. S 1661.

Pink, a Native American, was hired by Modoc in November 1983 as the coordinator of the Indian Child Welfare Act Program. Pink alleged that from July 1991 until her termination in October 1993, her former supervisor Forrest subjected her to sexual harassment, sexual assault and a hostile workplace environment. Pink brought suit under federal and state law in tort, for employment discrimination and breach of contract.1

The district court dismissed Pink's Complaint on several grounds. First, the court concluded that it lacked subject matter jurisdiction to hear Pink's suit under 28 U.S.C.S 1346 against IHS, a federal agency. Second, the court refused to allow Pink to substitute the United States as a defendant because Congress did not waive sovereign immunity to include the class of claims raised by Pink. Third, the court concluded that Modoc is a "tribe" for purposes of Title VII of the Civil Rights Act of 1964, and as such, is exempt from liability under Title VII. Fourth, the court held that Modoc did not lose its immunity merely because the Indian Self Determination and Education Assistance Act ("ISDEAA") contract was performed outside of reservation premises. Fifth, the court refused to impose Title VII liability against Forrest because a Title VII claim cannot be brought against an individual employee supervisor. Pink timely appealed pro se the district court's dismissal for lack of subject matter jurisdiction.2

II.

DISCUSSION

A. Indian Health Services

[1] Pink contends that the district court erred by dismissing

her claims against Indian Health Services ("IHS"). This contention lacks merit. Federal agencies "cannot be sued eo nomine unless so authorized by Congress in explicit language." Shelton v. United States Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977) (per curiam). Congress did not expressly authorize suits against federal agencies under the Federal Tort Claims Act. See Allen v. Veterans Admin., 749 F.2d 1386, 1388 (9th Cir. 1984). The district court therefore properly dismissed Pink's claims against IHS.

B. Amendment to Substitute the United States

[2] Pink's proposed amendment to substitute the United States would have been futile because Congress did not waive sovereign immunity. See 28 U.S.C. S 2680(h). Further, Pink conceded that she had no claim against the United States independent of her claims against Modoc and Forrest. Accordingly, the district court properly rejected Pink's amendment. See Stock West, Inc. v. Confederated Tribes of the Colville
Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989).

C. Title VII

Pink also argues that the district court erred by dismissing her claims against Modoc under Title VII because Modoc is not a "tribe" as defined by the Act. We disagree.

[3] Title VII prohibits employers from engaging in discriminatory practices. Congress, however, exempted "Indian tribe[s]" from the scope of the definition of "employer" as used in Title VII. See 42 U.S.C. S 2000e(b). Although the Ninth Circuit has not specifically addressed whether a nonprofit organization incorporated by two Indian tribes is a "tribe" for purposes of Title VII exemption, the Tenth Circuit has addressed a similar question. In Dille v.Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir.1986), the court held that a council comprised of thirty-nine Indian tribes that had joined

together to collectively manage energy resources was a "tribe" within the scope of Title VII's Indian tribe exemption. The Dille Court held that Congress intended to exempt individual Indian tribes as well as collective efforts by Indian tribes. The court reasoned that thepurpose of the tribal exemption, like the purpose of sovereign immunity itself, was to promote the ability of Indian tribes to control their own enterprises. See Dille, 801 F.2d at 375-76; see also Wardle v. Ute Indian Tribe, 623 F.2d 670, 672 (10thCir. 1980) ("Indian tribes and businesses operating on or near Indian reservations are excluded from the employment prohibitions of Title VII.").

[4] Here, Modoc served as an arm of the sovereign tribes, acting as more than a mere business. Modoc's board of directors consisted of two representatives from each Rancheria tribal government. Like the collection of tribes in Dille, Modoc was organized to control a collective enterprise and therefore falls within the scope of the Indian Tribe exemption of Title VII. See 42 U.S.C. S 2000e(b); see also Dille, 801 F.2d at 375-76. The district court properly concluded that Pink could not bring suit against Modoc under Title VII.

D. ISDEAA

Pink also contends that the district court erred by holding that the ISDEAA did not confer it subject matter jurisdiction.

Pink is incorrect.

[5] Congress sought to achieve essentially the same goal when it enacted the ISDEAA as when it excluded "tribes" from the operation of Title VII. Both the ISDEAA and the Title VII "tribe" exemption attempt to aid tribal entities in their efforts to conduct their own affairs and economic activities with as much autonomy as possible. See Dille, 801 F.2d at 374. Accordingly, the ISDEAA states,

"[n]othing in this Act shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. S 450n(1). Because theISDEAA does not effect tribal sovereign immunity, the district court was correct in holding that the ISDEAA could not confer subject matter jurisdiction.

[6] Pink additionally contends that Modoc waived its immunity because the alleged misconduct occurred outside of the reservation land. We disagree. Congress did not limit the scope of tribal immunity, as such, the tribes retain the extraterritorial component of sovereign immunity. See Richardson v. Mt. Adams Furniture (In re Greene), 980 F.2d 590, 596 (9th Cir. 1992); see also 25 U.S.C. S 450n (stating that nothing in the ISDEAA shall be construed as waiving a tribe's sovereign immunity). Thus, Modoc did not lose its exemption simply because it performed the self-determination contract for health services off the reservation. See In re Greene, 980F.2d at 596.

E. Individual Liability

Pink contends that the district court erred by dismissing her employment discrimination claims against Forrest because Title VII imposes individual liability. We disagree.

[7] Assuming arguendo that Modoc's immunity did not extend to Forrest, civil liability for employment discrimination does not extend to individual agents of the employer who committed the violations, even if that agent is a supervisory employee. See Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993). The district court therefore properly dismissed Pink's employment discrimination claims againstForrest, a Modoc employee.

F. Indian Civil Rights Act

[8] Pink additionally contends that the district court's dismissal violates her right to due process under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. S 1301. Pink is

incorrect. ICRA only provides a basis for an individual to bring a habeas corpus civil claim. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 981 (9th Cir. 1983).This court therefore rejects Pink's contention, raised for the first time on appeal, that her due process rights under ICRA were violated. Cf. Barker v. Menominee Nation Casino, 897F. Supp. 389, 394-95 (E.D. Wis. 1995) (holding that former employee of Indian casino could not sue for any alleged breach of due process rights under ICRA).3

G. Leave to Amend

Pink contends that the district court erred by denying her leave to amend her complaint. This contention lacks merit.

[9] This court reviews a denial of leave to amend for abuse of discretion. See DCD Programs, Ltd. v. Leighton, 833 F.2d
183, 185-86 (9th Cir. 1987). A district court properly denies a party's request for leave to amend if such leave would be futile. See id. at 186. Here, the district court denied Pink's request for leave to amend because the alleged facts, even if true, provided no basis for subject matter jurisdiction. The district court did not abuse its discretion by denying leave to amend on that basis. See id.

In sum, we find that the district court did not err in its dismissal of Pink's claims for lack of subject matter jurisdiction.

AFFIRMED.

FOOTNOTES

1 Specifically, Pink alleged eleven causes of action in her second

amended complaint: (1) breach of contract (v. IHS, Modoc); (2) bad faith

(v. IHS, Modoc); intentional misrepresentation (v. IHS, Modoc, Forrest);

(3) negligent misrepresentation (v. IHS, Modoc, Forrest); (5) intentional

interference with business relations (v. Forrest); (6) negligence (v. IHS,

Modoc, Forrest); (7) race and national origin discrimination under Title

VII and FEHA (v. IHS, Modoc, Forrest); (8) sexual harassment and hostile

work environment under FEHA only (v. IHS, Modoc, Forrest); (9) retaliatory discharge in violation of public policy under the California constitution and "U.S. Const. (Title VII)" (v. IHS, Modoc, Forrest); (10)intentional infliction of emotional distress (v. IHS, Modoc, Forrest); and (11) assault and battery (v. IHS, Modoc, Forrest). At the hearing, Pink withdrew her seventh cause of action under Title VII against IHS.

2 Pink was represented by counsel in the district court.

3 Only the tribal judiciary and legislature would be subject to liability in federal court under ICRA. See Barker, 897 F. Supp. at 395. Because Pink did not allege that she first challenged her termination in tribal court, no violation of Pink's civil rights under ICRA has occurred. See id. the end

Not For Publication

U.S. 9th Circuit Court of Appeals

PINK v MODOC INDIAN HEALTH
9615923

ROSEMARIE SOUTHCOTT PINK,
Plaintiff-Appellant,
No. 96-15923
v.
MODOC INDIAN HEALTH PROJECT, INC.; INDIAN HEALTH SERVICES; ERIN FORREST, as an individual,
Defendants-Appellees.
Submitted June 20, 1998*
San Francisco, California

Filed December 28, 1998

Before: Choy, Sneed, and Wiggins, Circuit Judges.

The petition for rehearing with suggestion for rehearing en banc is denied as untimely.

U.S. 9th Circuit Court of Appeals

PINK v MODOC INDIAN HEALTH
9615923

ROSEMARIE SOUTHCOTT PINK,
Plaintiff-Appellant,
No. 96-15923
v.
MODOC INDIAN HEALTH PROJECT, INC.; INDIAN HEALTH SERVICES; ERIN FORREST, as an individual,
Defendants-Appellees.
Submitted June 20, 1998*
San Francisco, California

Filed February 17, 1999

Before: Choy, Sneed, and Wiggins, Circuit Judges.

Appellant's Motion for Reconsideration of Denial of Petition for Rehearing is granted. This court's order filed December 21, 1998 is vacated and the mandate, issued on January 15, 1999, is hereby recalled.

The panel has voted to deny appellant's petition for rehearing with suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

MATERIAL REQUIRED BY SUBPARAGRAPH 1 (f)

- United States Code
- TITLE 25 - INDIANS
- Indian Reorganization Act of June 18, 1934 (48Stat. 984)

Sec 476 Organization of Indian tribes; constitution and bylaws; special election

(a) Adoption; effective date Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when - (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings (1) The Secretary shall call and hold an election as required by subsection (a) of this section - (A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or (B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws. (2) During the time periods established by paragraph (1), the Secretary shall - (A)

provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and (B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws. (3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws. (2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or

Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

Sec. 941g. Tribal Constitution and Governance

(a) Indian Reorganization Act If the Tribe so elects, it may organize under the Act of June 18, 1934 (25 U.S.C. 461 et seq.; commonly referred to as the "Indian Reorganization Act"). The Tribe shall be subject to such Act except to the extent such sections are inconsistent with this subchapter. (b) Adoption of new tribal constitution Within 180 days after the effective date of this subchapter, the Executive Committee shall draft and distribute to each Member eligible to vote under the tribal constitution in effect on the effective date of this subchapter, a proposed constitution and bylaws for the

Tribe together with a brief, impartial description of the proposed constitution and bylaws and a notice of the date, time and location of the election under this subsection. Not sooner than 30 days or later than 90 days after the distribution of the proposed constitution, the Executive Committee shall conduct a secret-ballot election to adopt a new constitution and bylaws. (c) Majority vote for adoption; procedure in event of failure to adopt proposed constitution (1) The tribal constitution and bylaws shall be ratified and adopted if - (A) not less than 30 percent of those entitled to vote do vote; and (B) approved by a majority of those actually voting. (2) If in any such election such majority does not approve the adoption of the proposed constitution and bylaws, the Executive Committee shall prepare another proposed constitution and bylaws and present it to the Tribe in the same manner provided in this section for the first constitution and bylaws. Such new proposed constitution and bylaws shall be distributed to the eligible voters of the Tribe no later than 180 days after the date of the election in which the first proposed constitution and bylaws failed of adoption. An election on the question of the adoption of the new proposal of the Executive Committee shall be conducted in the same manner provided in subsection (b) of this section for the election on the first proposed constitution and bylaws. (d) Election of tribal officers Within 120 days after the Tribe ratifies and adopts a constitution and bylaws, the Executive Committee shall conduct an election by secret ballot for the purpose of electing tribal officials as provided in the constitution and bylaws. Subsequent elections shall be held in accordance with the Tribe's constitution and bylaws. (e) Extension of time Any time periods prescribed in subsections (b) and (c) of this section may be altered by written agreement between the Executive Committee and the Secretary.

United States Code
TITLE 25 - INDIANS
CHAPTER 14 - MISCELLANEOUS
SUBCHAPTER II - INDIAN SELF-DETERMINATION AND EDUCATION
ASSISTANCE
For purposes of this subchapter, the term -
(a) "construction programs" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;
(b) "contract funding base" means the base level from which contract funding needs are determined, including all contract costs;
(c) "direct program costs" means costs that can be identified specifically with a particular contract objective;
(d) "Indian" means a person who is a member of an Indian tribe;
(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) "mature contract" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided (FOOTNOTE 1) the last proviso in section 450j(a) (FOOTNOTE 2) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

(FOOTNOTE 1) So in original. Probably should be "provided in". (FOOTNOTE 2) See References in Text note below.

(k) "State education agency" means the State board of education or other agency or officer primarily responsible

for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) "construction contract" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract - (1) that is limited to providing planning services and construction management services (or a combination of such services); (2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or (3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

Footnotes

[1] So in original. Probably should be "provided in".

[2] See References in Text note below.

TITLE 25 - INDIANS

CHAPTER 14 - MISCELLANEOUS

SUBCHAPTER II - INDIAN SELF-DETERMINATION AND EDUCATION

ASSISTANCE

Part A - Indian Self-Determination

(a) Request by tribe; authorized programs (1) The Secretary is directed, upon

the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs - (A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.); (B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) (25 U.S.C. 13), and any Act subsequent thereto; © provided by the

Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended (42 U.S.C. 2001 et seq.); (D) administered by the Secretary for

the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and (E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed. The programs,

functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support

the delivery of services to Indians, including those administrative activities supportive of, but not included as

part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions. (2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that - (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (B) adequate protection of trust resources

is not assured; © the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract; (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or (E) the program, function, service, or activity (or portion thereof) that is the

subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor. Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection, (FOOTNOTE 1) if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate

the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination

of the work when warranted. (FOOTNOTE 1) So in original. Probably should be "paragraph,". (3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract. (4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal - (A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or (B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title, subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this

title. If a tribal organization elects to carry out a severable portion of a

contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection. (b) Procedure upon refusal of request to contract Whenever the Secretary declines to enter into a self-determination

contract or contracts pursuant to subsection (a) of this section, the Secretary shall - (1) state any objections in writing to the tribal organization, (2) provide assistance to the tribal organization to overcome the stated objections, and (3) provide the tribal organization with a hearing on the record with the

right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title. (c) Liability insurance; waiver of

defense (1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act. (2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations. (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall

extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or

beyond the coverage or limits of the policy of insurance. (B) No waiver of the sovereign

immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs. (d) Tribal organizations and Indian contractors deemed part of Public Health Service For purposes of section 233 of title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections (FOOTNOTE 2) 450f or 450h of this title is deemed to be part of the

Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the

provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service

while acting within the scope of their employment in carrying out the contract or agreement: Provided, That such employees shall be deemed to be acting within the scope of

their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor. (FOOTNOTE 2) So in original. Probably should be "section". (e) Burden of proof at hearing or appeal declining contract; final agency action (1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof). (2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either - (A) by an official of the Department who holds a position at a higher organizational level within the Department than the levelof the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

Footnotes

[1] So in original. Probably should be "paragraph,".

[2] So in original. Probably should be "section".

CONSTITUTION AND BYLAWS OF THE CEDARVILLE RANCHERIA, MODOC COUNTY, CALIFORNIA

ARTICLE II TERRITORY

The jurisdiciton of this organization shall extend to the land now within the confines of the Cedarville Rancheria and to such other lands as may hereafter be added hereto.

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an election authorized by the cting Deputy Commissioner on Indian Affairs on Aug 17, 1977, the foregoing Constitution and Bylaws of the Cedarville Rancheria, Modoc County, Cedarville, California, was duly adopted by a vote of 5 for, 0, against, in an election in which at least thirty (30) percent of the 8 persons entitled to vote cast their ballots in accordance with section 16 of the Indian Reorganization Act of June 15, 1935 (49 Stat. 378)

S/ Frank L. Haggerty Jr.
Chairman, Election Board

S/ Wanda Dunn
Election Board Member

S/ Andrew Phoenix
Election Board Member

CONSTITUTION AND BYLAWS OF THE ALTURAS INDIAN RANCHERIA, MODOC COUNTY, CALIFORNIA

ARTICLE II TERRITORY

The jurisdiction of the Alturas Indian Rancheria shall extend to all lands now or hereafter comprising the Alturas Indian Rancheria. The jurisidiction of the Alturas Indian Rancheria shall not be inconsistent with applicable Federal and State laws.

Supreme Court, U.S.
FILED
1999
OFFICE OF THE CLERK

No. 99-182

IN THE

Supreme Court of the United States

ROSEMARIE PINK,

Petitioner,

v.

MODOC INDIAN HEALTH PROJECT, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MODOC INDIAN HEALTH PROJECT, INC. AND ERIN FORREST

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Modoc Indian Health Project, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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BASIS FOR JURISDICTION

"Review on a writ of certiorari is not a matter of right, but judicial discretion." Sup. Ct. R. 10. Petitioner claims that this matter should be heard because the ruling of the Ninth Circuit Court of Appeals is in conflict with the decisions of other appellate courts, with opinions of this Court and with congressional mandates. However, she does not provide any case or congressional citations to support this claim. In fact, the decision of the Ninth Circuit is consistent with decisions of other appellate courts, opinions of this Court and congressional mandates.

The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. United States*, 500 U.S. 344(1991). Because the issue of tribal sovereign immunity for tribal organizations has been resolved consistently among the Circuit Courts of Appeals, granting a writ of certiorari in this matter is unnecessary.

STATEMENT OF THE CASE

A. Background

Petitioner Rosemarie Pink ("Pink") was employed by the Modoc Indian Health Project ("Modoc"). In 1993, Pink was terminated by the Modoc Project Director, Erin Forrest ("Forrest"). In 1994, Pink filed a complaint in federal district court against Modoc, Forrest and Indian Health Services ("IHS") for employment discrimination, sexual harassment, and breach of contract. Both the District Court and the Court

of Appeals for the Ninth Circuit dismissed Pink's claims for lack of subject matter jurisdiction due to Modoc's tribal sovereign immunity.

1. *Alturas and Cedarville Rancherias*

Modoc's and Forrest's Indian sovereign immunity originates in the federally recognized status of the tribal governments of the Alturas and Cedarville Rancherias.

The Alturas and Cedarville Rancherias are located in rural northeast California, in Modoc County. They are among several dozen federally recognized tribes with federally recognized systems of Indian tribal self-government. The Rancheria governments operate on the basis of Constitutions and By-laws drafted and approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479. ("Reorganization Act").

The Rancherias are governed by popularly elected tribal general or community councils. The Tribal Councils, in turn, exercise authority to create tribal business or Executive Committees and other committees as they see fit to undertake tribal purposes. The Tribal Councils and Committees together have broad legislative and administrative powers in running the official affairs of the Rancherias.

Under their respective Constitutions, the Councils and Committees of both Rancherias apply for and oversee administration of federal contracts and grants, including self-determination programs they undertake themselves or through Modoc. The Rancherias have indirect control over the daily administration of Modoc's Indian Self Determination Act ("ISDA") grants from the IHS, by virtue of the control the Rancherias have over Modoc.

2. *Modoc Indian Health Project, Inc.*

Modoc is an "Indian Corporation" incorporated and chartered by the Rancherias under authority of the Solicitor of Indian Affairs and Section 477 of the Reorganization Act. *See* 25 U.S.C. § 477.

Modoc is, and at all times relevant to this litigation was, a "Tribal Organization" within the meaning of the ISDA and other federal statutes. *See* ISDA, 25 U.S.C. § 450f(a). Modoc's service area for its IHS contracts is the native American population of all of Modoc County, except the Fort Bidwell Indian Reservation. Modoc's offices are located in the City of Alturas in Modoc County within the service area.

Modoc management is composed of a Board of Directors selected exclusively from the Alturas and Cedarville Rancherias' governing Councils and Committees. Modoc Board members are selected and supervised in accordance with the political and cultural system establishing the Rancheria tribal government. Modoc's corporate charter states that Board members serve at the pleasure of those tribal governments. Member selection must be made in a manner consistent with the authority of the Rancheria tribal governments. Selection is therefore made in accordance with the federally approved and recognized Rancheria Constitution, Bylaws, ordinances, policies, and other legislative acts of the Tribal Councils.

The tribally-selected Board members, in turn, take an active and frequent role in Project administration and management. The Charter states that the business and administration of Modoc shall be managed by the tribally selected board members.

3. *Erin Forrest*

Erin Forrest is the Project Director for Modoc. Forrest is a nearly full-blooded Pit River Indian of the Hewise band, a tribe native to the area and a part of the Cedarville Rancheria. He was appointed Project Director by the Board of Directors of Modoc.

Forrest serves at the pleasure of Modoc Board Members. As Modoc Board members are subject to the Rancheria tribal politics and governing systems, Forrest is also subject to the control of those systems. Were any of the Rancheria tribal Councils or Committees dissatisfied with Mr. Forrest's performance, they could simply exercise their indirect control over Forrest.

QUESTIONS PRESENTED BY PINK

A. Does a provision in a tribal constitution, which expressly limits a tribe's jurisdiction to within the boundaries of the reservation, stop the tribe from creating a corporation which would enjoy the status of a tribe if the offices and activities of the corporation are outside the reservation and outside Indian Country?

1. *Modoc is Protected by Parent Tribe Immunity*

Numerous Circuit Courts of Appeals have held that tribal corporations carry the same immunity as their parent tribes, unless that immunity has been waived. *See In Re Greene*, 980 F.2d 590 (9th Cir. 1992) (involving a tribally-owned furniture store); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986) (considering a

reservation economic development enterprise). Relief against a tribal subsidiary organization is, in effect, relief against the tribe itself. *Superior Oil Co. v. United States*, 605 F. Supp. 674, 679 (C. D. Utah 1985), *rev'd on other grounds*, 798 F.2d 1324 (1986), *citing Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). *See also Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) ("suits against an agency like the Housing Authority normally are barred absent a waiver of sovereign immunity"). The Ninth Circuit Court of Appeals decision to afford Modoc the same immunity as the Alturas and Cedarville Rancherias was consistent with existing law.

a. *Modoc's Geographical Location is Irrelevant*

Despite consistent case law to the contrary, Pink asserts that, because Modoc is not located within the boundaries of either the Alturas or Cedarville Rancherias, tribal sovereign immunity has been waived. Pink's simplistic "on-reservation/ off-reservation" argument lacks merit. Pink's allegations claim wrongdoings on the premises of an ISDA organization. The issue is whether the locus of the dispute involved an internal tribal affair.

The decision of the Ninth Circuit that the location of Modoc's offices is irrelevant was consistent with its decision in *In Re Greene*, 980 F.2d 590. There, the Court found a furniture store located on a reservation was immune from a bankruptcy court's jurisdiction with respect to the store's business activities many hundreds of miles away in Montana. *Id.* at 592.

Important to the Court's holding in *In Re Greene* was the Self-Determination purpose of the tribal business entity.

Id. at 598. The court reasoned that subjecting tribal entities to litigation — merely because those entities were conducting business outside the boundaries of the reservation — would work against the Congressional policy of encouraging tribal economic development and self-determination. Similarly, the purpose of Modoc is to encourage tribal self-governance and self-determination. Failure to provide Modoc with sovereign immunity due to the geographic location of its offices would be contrary to the Congressional policy of encouraging self-determination and self-governance.

b. *Employee Grievances Are an Internal Tribal Affair*

This Court and other Circuit Courts of Appeals have found employee grievances to be internal tribal affairs, as did the Ninth Circuit in this case. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *EEOC v. Fond du Lac Heavy Equip. and Const.*, 986 F.2d 246, 249 (8th Cir. 1993).

The Eighth Circuit has held that an age discrimination claim brought by an employee of a Chippewa tribal corporation involved "a strictly internal matter" and was, therefore, barred by the tribe's sovereign immunity. *Fond du Lac*, 986 F.2d at 249. The court ruled that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, could not apply to a tribal business entity, on the grounds that the Act would affect the tribe's "specific right of self government". *Fond du Lac*, 986 F.2d at 249. In reaching this conclusion, the court relied heavily upon language in this Court's decision in *Santa Clara Pueblo,* that Indian tribes retain the power to regulate their "internal and social relations". *Santa Clara Pueblo,* 436 U.S. 49, 55; *Fond du Lac*, 986 F.2d at 248. Claims of employment discrimination and sexual harassment similarly are internal matters which should be resolved by the tribe or tribal organization.

c. *ISDA Tribal Organizations Govern Their Own Employment Affairs*

The ISDA provides substantial additional basis for a conclusion that a dispute between an ISDA Tribal Organization and an employee is not subject to review by a federal or state court. This Court has repeatedly recognized that the essential concept underlying "self-determination" under the ISDA is tribal self-government. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 510 (1991); *Bryan v. Itasca County*, 426 U.S. 373, 388 & n.14 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.19 (1986); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 & n.17 (1983); *see also Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 840 (1982).[1]

These findings stem from this Court's repeatedly expressed acknowledgment that in enacting ISDA and similar

---

1. The Supreme Court cases cited here often point to the ISDA's Congressional Statement of Findings that reflect the spirit of tribal self-determination under the ISDA:

> (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian People, finds that —
>
> . . .
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

25 U.S.C. § 450(a)(1).

statutes "Congress is committed to a policy of supporting *tribal self-government and self-determination*". *Nat'l Farmers Union Cos. v. The Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). The decision of the Ninth Circuit in this case is consistent with this Court's acknowledgment of Congress' commitment to supporting tribal self-government and self-determination by extending tribal sovereign immunity to Modoc.

B. Is a tribal corporation located off reservation and created by a consortium of tribes, whose constitutions limit the tribes' jurisdictions to their reservations, exempt from Title VII?

1. *"Indian Tribes" Exempt from Title VII*

Title VII specifically exempts "Indian Tribe[s]" from liability of the sorts of claims actionable thereunder, by excluding them from the definition of "employer". *See* 42 U.S.C. § 2000e(b). Modoc and Forrest are entitled to the "Indian Tribe" exemption for all claims that are actionable under Title VII. 42 U.S.C. § 2000e(b); *Miller v. Maxwell's International, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986).

2. *Modoc Is Exempt from Title VII Claims*

The Ninth Circuit held that Modoc is exempt from Pink's tribe lawsuit because the Indian tribe exemption applies to enterprises created and managed by federally recognized tribes. This decision is consistent with the Tenth Circuit decision in *Dille*, 801 F.2d 373 (10th Cir. 1986). *Dille* involved a consortium enterprise of 39 tribes created to

develop Indian reservation energy resources. The consortium was sued by several female employees for sexual discrimination. The Tenth Circuit upheld a district court's dismissal.

The Tenth Circuit reviewed the legislative history of the "Indian Tribe" exemption and concluded that the consortium was "precisely the type of activity that Congress sought to encourage" by the exemption. *Id.* at 375. The court found that the purpose of the exemption was to enable tribes to have maximum control over their own enterprises. *Id.* at 375. Private civil rights of action against tribal enterprises would undermine such control.

The reasoning of the Ninth Circuit in this matter is consistent with the decision of the Tenth Circuit set forth in *Dille*. As was the case in *Dille*, Modoc is a consortium organization created by two federally recognized tribes. Also, as in *Dille*, the tribes maintain substantial management authority over Modoc's affairs. The Equal Employment Opportunity Commission, which enforces Title VII, routinely rejects jurisdiction over such cases.

a. *Modoc's Geographical Location is Irrelevant*

See discussion *supra* Section II(A)(1)(a).

3. *Is a tribal corporation immune from suit in federal court when no tribal court exists?*

a. *Tribal Administrative Remedies Existed*

Although the Alturas and Cedarville Rancherias do not have formal tribal courts, tribal administrative remedies were

available to Pink. Pink was required, but failed, to exhaust the following "tribal administrative remedies": (1) appeal to Modoc Board via remedies and procedures set forth in the Personnel Policies Manual; (2) appeal to the Rancherias. This Court has repeatedly recognized that tribal administrative remedies need not be strictly "judicial" in order to be required to be exhausted. *See Nat'l Farmers Union*, 471 U.S. at 856; *United States v. Wheeler*, 435 U.S. 313 (1977). A hearing before Modoc's Board and a subsequent appeal to the tribal councils of the Alturas and Cedarville Rancherias would have afforded Pink the opportunity to have her claims heard. Her failure to avail herself of those remedies should not obviate the intent of Congress and this Court to assure tribal self-governance and self-determination.

MISSTATEMENTS OF FACT OR LAW CONTAINED IN PETITIONER'S BRIEF

A. Facts

Pink failed to comply with personnel policies which required her to file a complaint with Erin Forrest, as Project Director, and then appeal to the Board. The Department of Fair Employment and Housing ("DFEH"), did not recommend that she file a complaint against Forrest and Modoc. DFEH correctly determined that this was an internal tribal matter and, therefore, DFEH lacked jurisdiction to hear this matter. Although no formal tribal judicial system exists, formal appeal procedures are provided in the Modoc Personnel Policies. Pink failed to comply.

B. Law

Pink claims that the lower courts' decisions in this matter are inconsistent with decisions of other appellate courts, this Court and congressional mandates. That statement is in error.

1. *Pink's Apparent Reliance On Various Court Decisions Is Misplaced And Can Be Distinguished.*

To support her claim that this suit should be brought in federal court because no tribal judicial system exists for adjudicating complaints, Pink cites *Edward Krempel v. Prairie Island*, 125 F.3d 621 (8th Cir. 1997). The *Krempel* case is distinct from this case, in that, there were administrative and tribal remedies available to Pink. She deliberately chose to not avail herself of those remedies. In the *Krempel* case, tribal remedies were not available.

Pink also cites to *Nat'l Farmers Union*, 471 U.S. at 856, in support of her claim that deference to tribal courts is not absolute. This statement is inaccurate and misleading. In that case, this Court held that exhaustion of tribal remedies is required prior to consideration of the matter by the federal court.

> [T]he existence and extent of a tribal court's jurisdiction will require careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere and administrative or judicial decisions.

Id. at 855-856. In *Nat'l Farmers Union*, this Court addressed the commitment of Congress to support tribal self-government and self-determination and found that tribal remedies must be exhausted. Pink failed to exhaust the tribal remedies available to her.

Pink relies on the holding in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that "the civil authority of Indian Tribes and their courts with respect to non-Indian fee lands generally does not extend to activities of nonmembers of the Tribe." However, *Strate* is distinguishable upon the facts. In *Strate*, the property in question was a state-maintained highway which traversed across a tribal reservation. A right-of-way had been granted to North Dakota for the purpose of allowing the general public access to a federal water project. The highway was open to the public and the traffic on the highway was subject to the state's control. Thus, because North Dakota, a non-Indian entity, exclusively controlled the highway, the court held that the state court was the proper jurisdiction for causes of action arising in relation to the highway.

In contrast, Modoc's control is retained by both the Alturas and Cedarville Rancherias through the Board of Directors. Modoc serves only the native American population of Modoc County as opposed to the general public served by the highway in *Strate*. While the health center is operated off Indian land, the property was leased by Modoc for the sole purpose of conducting internal tribal affairs (providing health services to the native Americans living in Modoc County). Thus, the holding in *Strate* is inapplicable to the situation created by Modoc.

Additionally, Pink mistakenly contends that the ruling in *Alaska v. Native Village of Venetie Tribal Gov't et al.*,

522 U.S. 520 (1998), is controlling in the case at bar. Pink quotes the following in her brief:

> The tribe contends that the requisite federal superintendence is present because the Federal Government provides desperately needed health, social, welfare, and economic programs to the Tribe. Brief for Respondents 28. The court of Appeals majority found this argument persuasive. 101 F.3d at 1301. Our Indian country precedents, however, do not suggest that the mere provision of desperately needed social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem with ANCSA's minimal land-related protections, they are not indicitive of active federal control over the Tribe's land sufficient to support a finding of federal superintendence.

Pink's Petition for Writ of Certiorari, pg. 7.

Pink wrongly asserts that because the Village of Venetie was not located within Indian Country, and jurisdiction over the activities of nonmembers on village land was absent, then similarly, since Modoc is not located within Indian country, the "mere fact that they [Modoc] enter into contracts which provide services to Indians does not give them authority beyond that of a service provider."

Once again, Pink fails to differentiate between the facts of *Venetie* and this case. In *Venetie*, this Court was deciding the issue of whether land that was transferred to private corporations consisting of Indian shareholders under the

Alaska Native Claims Settlement Act ("ANCSA") and then subsequently conveyed to a tribe is "Indian Country". In enacting ANCSA, Congress specifically intended to end federal supervision over Indian affairs. Congress intended to accomplish this without creating a reservation system or lengthy wardship or trusteeship.

"Because ANCSA revoked the Venetie Reservation, . . . whether the Tribe's land is Indian country depends on whether it falls within the 'dependent Indian communities' prong of the statute." *Id.* at 953. In footnote two the court noted, "only one Indian reservation, the Annette Island Reserve, survived ANSCA. Other Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a 'dependent Indian community' under." *Id.* at 953.

The Alturas and Cedarville Rancherias do not need to meet the requirements of a "dependent Indian Community" because they are still Indian reservations under federal law. In *Venetie*, the land could be owned by non-Natives and used for non-Native purposes. Such is not the case with Modoc. Modoc's services can only be used by the native american population of Modoc County. Further, ANCSA specifically ended federal superintendence over the Venetie Tribe's lands. Quite contrarily, no such action has been taken regarding the land of the Alturas and Cedarville Rancherias. Modoc is merely an extension of the Rancherias. (*See Dille, supra*).

Pink correctly cites *Venetie* for its determination that the social programs in that case were "not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Id.* at 955. However, the healthcare provided by Modoc is different, since Modoc is a consortium of tribes empowered under ISDA grants to provide healthcare services to the Indian community.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals in this matter is consistent with previous rulings of this Court, other Circuit Courts of Appeals and congressional mandates. Based on the foregoing, we respectfully request that this Court deny Pink's Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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(2)

No. 99-182

IN THE

Supreme Court of the United States

Rosemarie Pink

v.

Modoc Indian Health Project,
Indian Health Service,
Erin Forrest, as an individual

On Petition For Writ Of Certiorari
To The Untied States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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BASIS FOR JURISDICTION

Respondents assert that petitioner has not provided any case or congressional citations to support her statement of jurisdiction. The citations were included in the discussion under (h), in the Petition for Certiorari. Included in the Basis For Jurisdiction statement were the Supreme Court rules under which jurisdiction was claimed. The inconsistency in the 9th circuit decision, lies in the fact that the 9th circuit decision and the manner in which the cited cases were discussed by the 9th circuit and the respondents, did not take into account the Constitution and Bylaws of each Rancheria, which expressly limits their jurisdiction to the confines of their respective Rancherias, The consequences of the lower court decision which disregards the creation documents of a Tribe in making a decision, is of such far reaching importance as to require review by this court. The recent Supreme Court Decisions in Alaska v Native Village of Venetie Tribal Government No. 96-1577 , Amoco Production Company v Southern Ute Indian Tribe No. 98-830 and Minnesota v Mille Lacs Band of Chippewa No. 119 S. Ct 1187 1203 were made after consideration of the legal actions and documents which governed the creation of the tribes as political entities recognized by the United States. In this case, for which certiorari is sought, the lower courts effectively conferred the status of Indian Tribe upon a corporation, which is not a tribal corporation, in violation of the governing documents of the member Tribes. Nor do those documents give individual tribal leaders, and certainly not program directors, authority to amend the constitutions in order to conduct business as they see fit. As specified in the Indian Reorganization Act and the Tribal Constitutions, amendments can only be made through secretarial election. The subject creation documents of the tribes, duly adopted and approved by each Tribe and the appropriate government official, as required by the Indian Reorganization Act, dictate the Tribe's political relationship with other entities, including the state and federal government. The effect of the lower court's

decision in this case is that Modoc Indian Health could conceivably retain the authority of a tribe, even if the member tribes were to withdraw their support from Modoc. After all, if the authority of the tribe has been disregarded at its most basic level, what would prevent Modoc Indian Health or similar organizations from disregarding the Tribe's authority in other matters? In fact, this has already been done by Modoc Indian Health, by refusing to seat the duly elected health board members in favor of a member of Director Erin Forrest's choosing. The Indian Health Service has not altered its business with Modoc Indian Health in any way as a result of this action by Modoc. It is apparent that IHS is recognizing the authority of Modoc over the authority of a member tribe.

The decisions made by the courts in the cases cited by the petitioner, were decided with the creation and governing documents of the subject Tribe or Tribes being the primary deciding factor in the court's decision. The respondents would prefer the court to ignore the founding documents of the tribes by attempting to define the issues as general tribal sovereign immunity and on/off reservation issues, in opposition to decisions of this court. In the opinion of this court in the Minnesota v Mille Lacs the court states:

"The... argument that similar language in two treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of thebasic principles of treaty construction. The review ofhistory and negotiations of the agreement is central to the interpretation of treaties."

Based on the above, Modoc's contention that certiorari is unnecessary, is in error.

MISSTATEMENTS OF FACT OR LAW CONTAINED IN RESPONDENTS BRIEF.

Respondents brief contains several misrepresentations of fact that could affect the way case law and federal law is applied to this case.

Respondent claims that The Department of Fair Employment and Housing (DFEH) did not recommend that Petitioner file a complaint against Forrest and the Modoc Indian Health Project. Petitioner did not make that statement. The DFEH, through Director Fransico Godina, told the Petitioner and a co-worker, who had filed similar complaints with the DFEH against Modoc and Forrest, that the DFEH legal department had recommended that the DFEH file complaints against Forrest and MIHP. A week later, the DFEH told the petitioner and the co-worker that MIHP had challenged the State's jurisdiction and the legal department thought that maybe they didn't have jurisdiction. The DFEH closed the case, due to lack of jurisdiction, but did not make a determination that the matter was an internal Tribal affair.

Respondent states that "Modoc is, and at all times relevant to this litigation was, a 'Tribal Organization' within the meaning of the ISDA and other federal statutes. " If the tribal constitutions of the Alturas and Cedarville Rancherias expressly prohibit the formation of reservation corporations that would have an authority and status equal to the tribes themselves, then Modoc cannot be a "Tribal Corporation", within the meaning of the ISDA.

Respondent States that their Service area is "all of Modoc County, except the Ft. Bidwell Indian Reservation." That fact has no bearing on this case because the bounderies of a service area is simply the geographical area which is served by the Modoc Indian Health Project and is unrelated to the jurisdicitonal boundaries of each Tribe.

Respondent states that "Modoc Board members are selected and supervised in accordance with the political and cultural system establishing the Rancheria tribal government". This statement is in error. The basic governing document of each Rancheria is the duly approved and adopted constitution and by-laws. The manner of selection of representatives to various committees and boards is specifically outlined in the tribal constitution. Modoc Indian Health has not adhered

to the terms of the tribal constitution regarding Cedarville's representative to the MIHP Board of directors. In fact Modoc refused to seat the duly elected tribal representative from the Cedarville Rancheria. Therefore Modoc is not acting as though it is controlled and managed by it's member tribes and is in violation of it's own charter.

Respondent alludes to the fact that Erin Forrest, the Project Director, is a member of the Cedarville Rancheria. In fact, Mr. Forrest is not now, has never been and is not eligible to be a member of the Cedarville Rancheria. The Hewise Band is part of the Pit River Tribe, whose tribal offices are located in Burney, CA. Even if the Hewise Band were to give up their membership in the Pit River Tribe, or if Mr. Forrest were to relinquish his membership in the band, he would under no circumstances be eligible for membership in the Cedarville Rancheria.

Respondent states that Petitioner failed to exhaust tribal remedies. In fact there are no tribal remedies or system for adjudicating complaints against Modoc Indian Health Project. No tribal Court exists and there is no provision in the constitutions, by-laws or ordinances of either the Cedarville or Alturas Rancherias which provides for the adjudication of complaints regarding any aspect of the operations of the Modoc Indian Health Project or similar organizations. This is further evidence that the Tribes do not consider Modoc Indian Health to be an "arm" of either Rancheria,, which is in accordance with their respective constitutions. The petitioner followed the personnel policies and procedures of the Modoc Indian Health Project in seeking assistance in resolving her concerns about the behavior of the Project Director. The policies state that a complaint **may** be submitted to the Project Director after first attempting to resolve the problem with the immediate supervisor, informally. Since the immediate supervisor and the Project Director was the same person, petitioner filed a grievance with the MIHP Board after an informal attempt to resolve the complaint

resulted in more harassment. The board did not respond to petitioner's initial complaint, nor to the second grievance filed due to wrongful termination. There is no further appeal process delineated in the personnel policies and procedures. In fact, the personnel polices state that "The applicant or employee retains the right to file a complaint with any State or Federal agency exercising authority in matters of discrimination (e.g. Equal Opportunity Commission) and with Federal agencies funding Project activities."

Respondent's statement that "Modoc serves only the Native American population of Modoc County, is not accurate. Modoc financially supports various programs that provide services to the general population. Programs supported by Modoc include the Modoc Performing Arts Council, the annual Modoc Health Fair, and the Modoc County dental clinic, which serves the general population.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals, by it's failure to consider the creation and governing documents of the subject Tribes, is in opposition to decisions made by this court. I respectfully request that the Court grant Certiorari in this matter.

Respectfully submitted

/s/

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